

¹ ALJ Order (Apr. 4, 2008).

time of his accident and that claimant's impairment contributed to the accident. Consequently, respondent and its insurance carrier argue this claim is barred by K.S.A. 44-501(d)(2) and, therefore, the Board should deny claimant's request for benefits.

Conversely, claimant contends the preliminary hearing Order should be affirmed. Claimant argues he took Darvocet *after* the accident, which he asserts explains his positive drug screen results. He also argues his accident was caused by faulty clamps that gave way while he was moving the assembly that he had welded. Accordingly, claimant requests the Board to adopt Judge Moore's finding that this claim is compensable under the Workers Compensation Act.

The only issues before the Board on this appeal are:

1. Did respondent and its insurance carrier prove claimant was impaired at the time of his accident?
2. If so, did such impairment contribute to his accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned finds as follows:

Respondent manufactures hoppers for railroad cars. On November 12, 2007, claimant was working for respondent as a welder. On that date, claimant injured his low back when a 200- to 250-pound hopper and gate that he had welded together (otherwise known as a stack) fell from a hoist and struck him. Claimant described the accident as follows:

I took the stack off the jig after I welded it, I set it on the floor, I flipped it over, I hooked up, hooked it back up to the hoist. I picked it up and moved it over to the shipping rack. The clamp on the right side bent and came unhooked, came down on me, slammed me up against the jig that I welded on, welded it on, pinned me there. The other side came unhooked and went down to the ground, and I felt burning in my back, lower back, within a little bit -- I was getting pains shooting down my leg.²

According to claimant there is little space to maneuver when moving the stacks to the shipping rack and sometimes his body rubs against the jig. Claimant feels there is no way he could have gotten out of the way of the stack when it fell.

² Williams Depo. at 13.

Claimant further testified how the clamps that were used to move these parts would bend and give way daily. And daily claimant would straighten the clamps with a hammer to try to keep them from giving way. Following the accident claimant hammered the clamp back into shape and returned to his work duties.

The accident occurred at approximately 6:45 a.m., which was within an hour of claimant reporting to work. But claimant did not report the accident to respondent until approximately 10 a.m., after welding two more stacks and allegedly going to his locker and taking two Darvocet. Claimant testified, in part:

[Following the accident] I welded two more, my back started bothering me, I went to my locker and got two Darvocet out that was in this coat in my locker, and I took them because of the pain. They were my mother-in-law's, she gave them to me because I ran out of Lortabs; I've got a blood clot in my left leg. At that time I didn't take them [Lortab] daily, just whenever it flared up.³

When claimant's symptoms worsened, he notified respondent of his accident and he was immediately referred to Dr. David Buller for medical treatment. Respondent also requested a drug screen, which came back positive for propoxyphene.

Claimant denies taking Darvocet any time before his accident. He explained his mother-in-law had given him the Darvocet in the event he needed them for his blood clot before he returned to his doctor. Claimant testified he advised a supervisor, Jeff Krahl, and the human resources coordinator, Angela Patton, about his accident and that he needed to see a doctor as the pain killers he had taken had not stopped his pain. But Ms. Patton denies claimant mentioned he had taken pain killers immediately following the accident. According to Ms. Patton, she was shocked upon learning claimant had failed his drug screen.

Another welder and co-worker, Ronny McIntire, corroborated claimant's testimony about the clamps bending or stretching and regularly giving way. In addition, claimant told Mr. McIntire that he had taken the Darvocet after the accident because of his back symptoms. Moreover, Mr. McIntire was aware claimant had experienced a blood clot in his leg but thought claimant had recovered from that before his November 12, 2007, accident.

Part of claimant's medical treatment includes a neurosurgical consultation. In December 2007, Dr. Matthew N. Henry recommended low back surgery, which respondent and its insurance carrier have refused to provide voluntarily.

³ *Id.* at 27.

Respondent and its insurance carrier presented the medical report of Dr. John F. McMaster, a certified medical review officer who reviewed claimant's drug screen report, respondent's report of accident, office notes from Dr. Buller, photographs of the hoist and clamps provided by respondent, and claimant's January 24, 2008, deposition testimony. The doctor concluded the propoxyphene revealed in claimant's post-accident drug screen contributed to claimant's accident.

The undersigned agrees with Judge Moore that claimant is entitled to receive workers compensation benefits for his November 2007 accident. As indicated above, respondent and its insurance carrier do not challenge that claimant's accident occurred or that the accident injured claimant's low back. The remaining issues are whether respondent and its insurance carrier have proven that claimant was impaired at the time of the accident and, if so, whether such impairment contributed to his accident.

The undersigned finds that both claimant's testimony and Mr. McIntire's testimony are credible and persuasive. Accordingly, the undersigned finds that claimant's accident occurred as the result of faulty clamps and that claimant took the Darvocet after the accident occurred. Based upon those findings, the evidence fails to establish that claimant was impaired at the time of the accident. The undersigned also notes that Dr. McMaster's report does not address the time frame when claimant took the pain medication. Moreover, Dr. McMaster's conclusion that claimant's impairment contributed to the accident is entitled minimal weight, if any, as the photographs the doctor reviewed in formulating that opinion neither accurately depicted the type of clamps claimant was using at the time of the accident nor accurately depicted the piece of equipment claimant was hoisting when the accident occurred.

In conclusion, claimant's November 12, 2007, accident arose out of and in the course of his employment with respondent and claimant is entitled to receive workers compensation benefits, including appropriate medical treatment, for the injuries sustained.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the April 4, 2008, preliminary hearing Order entered by Judge Moore.

⁴ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of June, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Scott M. Price, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge